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No. 89-396

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

October Term, 1989

JOHN W. WIGGINS and GARY R. ADAMS,
Petitioners,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below erred by requiring Petitioners, whose positions of employment were eliminated amidst an economically-based departmental reorganization, to produce direct, circumstantial or statistical evidence in lieu of a direct or indirect replacement, in order to state a *prima facie* case of discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-34?

2. Whether the court below erred in holding that Petitioners failed to create a genuine issue of material fact that the non-discriminatory reasons articulated by Respondent for eliminating their positions of employment were but a pretext to discriminate in violation of the ADEA?

DISCLOSURE OF CORPORATE AFFILIATION

As of August 1, 1989, the Firestone Tire & Rubber Company, an Ohio corporation, has changed its name to Bridgestone/Firestone, Inc. Bridgestone/Firestone, Inc. is a wholly owned subsidiary of Bridgestone Corp., a publicly held corporation in Japan.

Bridgestone/Firestone Inc.'s non-wholly owned subsidiaries are: Firestone De la Argentina SAIC; NV Firestone Belgium SA; Harbell Fire & Casualty Co., Ltd; Xylos Assurance Limited; L&C Marine Transport Limited; L&C II Limited; L&C III Limited; Industria de Pneumaticos Firestone Ltda; Firestone France SA; France Pneu SA; Firestone Italia SpA; Firestone International Development SpA; Liberian Metal Processing Incorporated; Pista de Pruebas Amistad SA de CV; Firestone NZ Limited; Firestone Tire and Rubber Company of New Zealand Limited; Northern Tyre Company (1975) Limited; Firestone Hispania SA; Firestone (Ceylon) Limited; Firestone (Uganda) Limited.

Bridgestone/Firestone Inc.'s affiliates are: Hopewell International Insurance Ltd; United Insurance Company; Corporate Officers & Directors Assurance Holdings Ltd; Corporate Officers & Directors Assurance Ltd; Exel Limited; Firestone Products Industrias Ltda; Firestone Nordeste SA; Firestone Distribuidora e Commercial Ltda; Dayton Tire Canada Ltd; Firestone East Africa (1969) Limited; Liberian Bank for Development and Investment; Lone Star Transport Lines, Inc; Hulera El Centenario SA; Ultrallantas SA de CV; Philtread Tire & Rubber Corporation; Sumak Realty Corporation.

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OPINIONS BELOW

The *per curiam*, opinion of the United States Court of Appeals for the Sixth Circuit which is not recommended for full-text publication is reproduced in the Petition at App. A1. The unpublished opinion of the United States District Court for the Northern District of Ohio is reproduced at App. A8.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 7, 1989. Petitioners' request for rehearing and rehearing *en banc* was denied by the Court of Appeals by judgment entered July 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §623(a)(1), (f)(3).

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(3) to discharge or otherwise discipline an individual for good cause.

29 C.F.R. §1627.3(a).

Records To Be Kept By Employers.

(a) Every employer shall make and keep for three years payroll and other records for each of his employees which contain:

- (1) name;
- (2) address;
- (3) date of birth;
- (4) occupation;
- (5) rate of pay; and
- (6) compensation earned each week.

STATEMENT OF THE CASE

Between 1982 and 1985, Firestone shuttered 25 of its 49 passenger retread tire plants due to a significant decline in demand. The closures decreased the number of production employees from 533 to just 230. The retread division posted losses of \$1,934,601 in fiscal year 1983, and \$1,558,450 in 1984.¹

The substantial decreases in the number of operating plants and hourly production workers, not surprisingly, forced the Company to re-examine its Akron, Ohio salaried workforce, the division having become top-heavy. Gary Adams was the salaried manager for retread equipment, and his responsibilities focused largely on coordination and transfer of equipment between retread plants. Firestone determined that his position could be eliminated entirely, with the least detrimental effect on continued operations, since the substantial decline in the number of retread plants significantly diminished the need for new or replacement equipment. John Wiggins held the position of salaried coordinator and product planning, which involved sales promotions, planning and forecasting in addition to negotiating sales contracts for tread rubber, repair materials and retread. Again, the continued need for these responsibilities correlated directly to the number of operating units. Upon

¹ A part of Petitioners asserted age pretext evidence consisted of an allegation that the retread division experienced a profit in June, 1986—eleven months after they were released (Pet. at 10). Certainly this after-the-fact evidence, whether accurate or not, fails to raise a genuine issue of material fact as to reduction in forces occurring over those periods of time when the division was patently unprofitable. It was only by cutting back and eliminating unnecessary positions of employment that the losses could be turned into a gain, and ultimately, the entire division sold. The fact Firestone achieved its goal of making the division profitable is perhaps the best evidence that its decisions were the correct ones and sound.

elimination of these positions, no one was ever transferred in or hired to fill them, and whatever responsibilities remained of once full-time positions were parceled out to the remaining salaried employees who were performing different duties. The decisions to eliminate these salaried positions were made by two executives, John E. Fry, Jr., age 46, and J. R. Thomas, age 57. The reductions occurred the week of August 22, 1985.

Nearly two years later, on August 21, 1987, Wiggins and Adams commenced an action against Firestone in the Court of Common Pleas of Summit County, Ohio alleging, *inter alia*, that they were released in violation of the ADEA; in violation of Ohio's age discrimination statute, Ohio Rev. Code §4101.17; and in breach of an implied or expressed contract for continued employment. Firestone timely removed the causes to the United States District Court for the Northern District of Ohio, Eastern Division, on the basis of federal question jurisdiction, pursuant to 28 U.S.C. §1441. Following completion of discovery, Firestone moved for summary judgment, arguing that neither plaintiff could establish a *prima facie* case of unlawful age discrimination and, in the alternative, that neither could establish that the elimination of their salaried positions of employment was pretextual. On March 22, 1988, the district court granted Firestone's motion on the ADEA claim, remanding the pendent claims for disposition by the state court. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S. Ct. 614 (1988). Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the district court's decision on June 7, 1989. A petition for rehearing and rehearing *en banc* was timely filed and denied by the court on July 26, 1989.

**REASONS FOR DENYING
DISCRETIONARY REVIEW**

I. THE DECISION BY THE SIXTH CIRCUIT DOES NOT PRESENT A CONFLICT WITH THE DECISIONS OF ANY OTHER FEDERAL COURT OF APPEALS OR OF THIS COURT, AND DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW NOT ALREADY SETTLED BY THIS COURT.

A. The Sixth Circuit's Decision That Purported ADEA Discriminatees Produce Direct, Circumstantial Or Statistical Evidence To Establish A *Prima Facie* Case Of Unlawful Discrimination, Where Positions Of Employment Are Entirely Eliminated During a Departmental Reorganization, Is Not At Odds With Any Other Circuit.

To bolster their Petition before this Court, Petitioners have manipulated, twisted and misstated the unpublished, *per curiam* opinion drafted by the court of appeals, all in an effort to artificially create circuit conflict. If successful, and the Petition is granted, it would serve to transform *certiorari* from discretionary to obligatory review through simple mischaracterization. Acceptance of this Petition would represent the ultimate advisory opinion since the court below never held what Petitioners now claim it did.

Although Petitioners have certainly expressed *their* belief that the Sixth Circuit requires, "... in order to establish a *prima facie* case, [that they] show that a younger person directly replaced [them] in [their]

'eliminated' job" within this Court's *McDonnell Douglas* analysis (Pet. at i),² the Court's written opinion in this and other cases tells a different tale:

The district court determined that Wiggins and Adams failed to prove that Firestone used the RIF as a pretext to discriminate against them on the basis of their age.

* * *

Although this Court has relied on the criteria established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to determine whether plaintiffs have shown a *prima facie* case of discrimination, this Court has "refused to follow blindly the four-part McDonnell Douglas formula in ADEA cases" and has instead "adopted a case-by-case approach, one that would allow us to remain attentive to the realities of the business world." *Simpson v. Midland Ross Corp.*, 823 F.2d 937, 940-41 (6th Cir. 1987). Thus, the Court has stated that to establish a *prima facie* case of discrimination in non-RIF situations, plaintiffs must show that they were members of a protected class, that they were subject to an adverse employment action, that they were qualified for their positions, and that they were replaced by younger persons. In reorganization cases, this court has required plaintiffs to "come forward with additional direct, circumstantial, or statistical evidence that age was a factor in [their] termination." *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1091 (6th Cir. 1984).

² In the trial court, Petitioners sought to establish their ADEA claims under the indirect method of proof articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The propriety of using this Title VII analysis in ADEA claims is not in dispute. "[T]he substantive provisions of the ADEA 'were derived in *haec verba* from Title VII' and apply with equal force." *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

Turning to the instant action, although Wiggins and Adams have satisfied the first three parts of the *McDonnell Douglas* test, the record does not indicate that they were not replaced by younger workers but, rather, that their work was merely distributed to existing workers. *Assuming, arguendo, that they satisfied the McDonnell Douglas test for a non-RIF setting, the additional evidence which they presented fails to prove that age was a factor in their termination* (emphasis added).

The court did not, as represented in the petition, mandate Petitioners to point to a "replacement"—direct or indirect—in order to evidence a *prima facie* inference of age discrimination within the backdrop of corporate reorganizations, only that, in lieu thereof, they come forward with "something else" before the defendant-employer will be called upon to meet its burden of production. The Sixth Circuit made this position clear in published opinions both before and after its decision here. *See Tye v. Bd. of Edc., Polaris Jt. School Dist.*, 811 F.2d 315, n.1 (6th Cir. 1987) ("Appellees' argue that because Ms. Tye was terminated as part of a reduction in force, this circuit's decision in *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984), requires her to present additional evidence in her *prima facie* case. *LaGrant* holds that an ADEA plaintiff who cannot prove that he was replaced by a younger person in a reorganization or reduction in force, must present in his *prima facie* case some direct, circumstantial, or statistical evidence that age was a factor in his termination"); *McMahon v. L-O-F Co.*, 870 F.2d 1073, 1077 (6th Cir. 1989) ("However, LOF contends that plaintiffs failed to establish a *prima facie* case of age discrimination [because of lack of replacements] as set forth in *LaGrant v. Gulf. & Western Mfg. Co.*, 748 F.2d 1087 (6th Cir. 1984). In *LaGrant* we only held that when

there is a corporate reorganization or reduction in forces, the 'mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a *prima facie* case of age discrimination'. *LaGrant*, 748 F.2d at 1090. All *LaGrant* required was that the plaintiff come forward with additional direct, circumstantial or statistical evidence that age was a factor in his termination").

The Sixth Circuit's holding not only makes common sense,³ it is aligned with the opinions of its sister circuits. See *Hall v. American Bakeries Co.*, 873 F.2d 1133 (8th Cir. 1989) (It is not discriminatory to discharge a worker and re-assign his job duties pursuant to a reduction in force); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) ("In reduction-in-force cases, plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee. Consequently, courts have modified the fourth *prima facie* element by requiring the plaintiff to 'produce evidence, circumstantial or direct, from which a fact

³ Petitioners suggest that whenever an age 40 + employee is displaced in an employer's reorganization, and younger employees retained in any other, albeit different positions, their claim of discrimination ought to find its way to a jury:

In sum, even without a direct RIF replacement or direct evidence of discriminatory intent, the former employees' disparate treatment case based upon retention of younger employees and/or more favorable treatment of them should go to a jury.

(Pet. at 13). This position would seem to urge a restructuring of the *McDonnell Douglas* burdens of proof, something this Court rejected just last term. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. _____, 108 S. Ct. 2777, 2784 (1988); *Wards Cove Packing Co. v. Antonio*, 490 U.S. _____, 109 S. Ct. 2115, 2126 (1989). A second problem with this argument is that the Sixth Circuit did not state or hold that it mandated "a direct RIF replacement" or "direct evidence of discriminatory intent".

finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue' "); *Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988) (substituting replacement criteria with showing "... that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff"); *Montana v. First Federal S & L of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989) ("As alternatives, the plaintiff was permitted to show direct evidence, statistical evidence, or circumstantial evidence supporting an inference of age discrimination").

The opinion hardly conflicts with this Court's teachings. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978) (the *McDonnell Douglas* test "was never intended to be rigid, mechanized or ritualistic"). Accord *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, n.6 (1981); *McDonnell Douglas Corp.*, 411 U.S. at 802.

II. THE DECISION BY THE SIXTH CIRCUIT MUST BE AFFIRMED DUE TO AN ABSENCE OF PRETEXT EVIDENCE.

A. The Sixth Circuit Correctly Held That Petitioners Failed To Unearth Any Evidence That Respondent's Reduction-in-Force Was But A Pretext To Discriminate Against Them On The Basis Of Their Ages.

Conveniently ignored in the petition is the finding by the Sixth Circuit that Petitioners had failed to meet their ultimate burden of creating genuine issues of material fact that Respondent reduced its forces and eliminated salaried positions all in an effort to mask its discriminatory objective. Where Petitioners miss the boat is that even if the Sixth Circuit erred by requiring them to come forward with "direct, circumstantial or statistical" evidence at the *prima facie* stage, that same evidence in one form or another is nonetheless indispensable at the pretext level of *McDonnell Douglas*:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. *This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination.*

Burdine, 450 U.S. at 256 (emphasis added).

The pretext evidence offered by Petitioners was neither genuine nor material, and included: (1) the contention that Petitioners were not permitted to bump or transfer into other Firestone positions pursuant to a "self-imposed contractual duty to allow transfers" (Pet.

at iii),⁴ all the while ignoring that the written Firestone policy only permitted transfers where the employee formerly supervised or at one time held remaining employment positions, and that neither Petitioner met this criteria; (2) the allegation that "[f]rom at least as early as 1982 . . . the employer . . . maintained, generated and disseminated in Akron a plethora of facially discriminatory computerized personnel forms and reports, rife with birthdates" (Pet. at 8), while failing to mention that retention of this information is compelled under current federal regulations, 29 C.F.R. §1627.3, and moreover, without mentioning that there was an absence of proof the information was ever utilized or even available for purposes of personnel decisions; and (3) the suggestion that "... the average age in the department thereby decreased from 45.3 to 43.9 years and had decreased from 50 years in 1981" (*Id.*), while ignoring the critical flaw of establishing under what circumstances—voluntary or involuntary—the employee departures occurred.

It is not shocking to find that every one of the ten circuit decisions cited by Petitioners as "conflict" established this indispensable pretext evidence. See *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir. 1983); *Stamey v. Southern Bell Tel. & Tel. Co.*, 859 F.2d 855, 860 (11th Cir. 1988) (showing not only a younger replacement, but probative statistical

⁴ A further mischaracterization contained in the petition is the suggestion that Respondent's employee handbook "has been held to have created a unilateral contract and part of its salaried employees' package" as allegedly affirmed in relevant part by this Court in *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), _____ U.S. _____, 109 S. Ct. 948 (1989). This Court is most assuredly aware of the opinions it authors and no unstrained reading of *Bruch* could even suggest the Court had addressed this issue of state law.

evidence as well); *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1059 (8th Cir. 1988); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1334 (1st Cir. 1988); *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 408 (5th Cir. 1989); *Oxman v. WLS-TV*, 846 F.2d 448, 456 (7th Cir. 1988); *Herold v. Hajoca Corp.*, 864 F.2d 317, 320 (4th Cir. 1988); *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 60 (3d Cir. 1989); *Montana v. First Federal S. & L. of Rochester*, 869 F.2d 100, 105 (2d Cir. 1989).

Petitioners further contend "[t]he District Court and Court of Appeals ignored the 'existence' of the Age Data Forms, apparently *sub silentio* finding them permissible" (Pet. 15). There was nothing *sub silentio* about the Circuit's holding, and it most assuredly did not ignore this "evidence" (See Pet. App. p. A5). Not only did Plaintiff's counsel concede at oral argument before the Court of Appeals that Firestone was required to keep this information as part of its federal, record-keeping obligations, but the Court went on to observe there was no disputed evidence offered by Petitioners that the forms were used to make employment decisions, let alone these particular employment decisions (*Id.*). At best, granting the petition in this case would place this Court in the position of merely re-examining record evidence that has already been thoroughly reviewed and discounted by the two lower federal courts.

CONCLUSION

The decision by the Sixth Circuit is not at odds with another circuit that has ruled on the precise issue sought to be reviewed. However, even if the Sixth Circuit's *prima facie*, substitution criteria of "direct, circumstantial, or statistical evidence" were struck down, the opinions and ultimate conclusions regarding age discrimination that were reached below must nevertheless be affirmed at the pretext level of the *McDonnell Douglas* analysis. Thus the petition for writ of *certiorari* must be denied.

Respectfully submitted,

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